RESPONSIBILITY WITH SOVEREIGNTY IN PROTECTION OF FORESTS

Striking a Balance between Global Approach to Protection of Forests and Sovereignty of States

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Supervisor: Christina Voigt

Candidate number: 8002

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DEDICATION

I lovingly and happily dedicate this thesis to my brother Belachew Gizachew Zeleke who has always helped me and believed that I could do it.

List of Abbreviations and Acronyms

CBD:	Convention on Biological Diversity
CBDR:	Common but Differentiated Responsibilities
CIDH:	Inter-American Court of Human Rights
CIL:	Customary International Law
COP:	Conference of the Parties
EIA:	Environmental Impact Assessment
FAO:	Food and Agriculture Organization
FCCC:	Framework Convention on Climate Change
IACHR:	Inter-American Commission of Human Rights
ICJ:	International Court of Justice
ILC:	International Law Commission
IPCC:	Intergovernmental Panel on Climate Change
IUCN:	International Union for Conservation of Nature
LOS:	Law of the Sea
NGO:	Non-Governmental Organization
NLBI:	Non-Legally Binding Institution
REDD:	Reducing Emission from Deforestation and Forest Degradation
U.K:	United Kingdom
UDHR:	Universal Declaration of Human Rights
UN:	United Nations
UNCED:	United Nations Conference on Environment and Development
UNECE:	UN Economic Commission for Europe
UNEP:	UN Environment Programme
UNFCCC:	UN Framework Convention on Climate Change
WSSD:	World Summit on Sustainable Development

1 Introduction

In international environmental law, forest law is often perceived as undeveloped area of law. Major threats posed from multidimensional environmental crisis facing planet earth and the humanity: climate change, loss of forest biodiversity, deforestation, and environmental degradation have been evident due to unbinding, unprincipled and uncoordinated nature of forest law; and represent a significant pressure on the world's community of states. Because of the growing concerns about the consequences of such environmental crisis on human life, and health as well as the environment on its own sake, there have been wide spread legal attempt to clarify and articulate the underpinning values and objectives of international forest policies which can grace the road to further development of binding international forest law.

However, there exists a tension between claims of absolute sovereignty over forest resources and the overarching and increasingly accepted forest protection legal regimes which could guide the establishment of binding international forest law: the 'no-harm rules', CBD, UNFCCC, the principles of common but differentiated responsibility, the principle of state responsibility, and the trans-boundary cooperation. The international environmental law considerations of deforestation, and forest degradation problems require more than what is currently existing at principle levels.

Furthermore, the important role for a set of general legal principles, objectives, and procedures underpinning forest protection, and setting the parameters and establishing ground rules for global forest law attract global attention and soften states sovereignty as a shield to destroy forests. Indeed, the concept of states sovereignty exists as important principle to express a state's equality with other states on international forum. Therefore the researcher, in the presented thesis deals with the question of how to put a possible balance between these two competing domestic and international interests as

the core concern of the research. To do so, the researcher employs textual legal analysis method in to the relevant literatures.

1.1 Main research questions and structure of the research

1.1.1 The research questions

The main research questions in this thesis include:

1. Is sovereignty a key obstacle for the development of binding international forest law?

2. Can states because of sovereignty violate available principles and conventions to destroy forests with impunity or are there some balancing mechanisms?

1.1.2 The structure of the Thesis

In this Thesis, I use textual analysis approach to present:

a) The introduction, justification and objectives of the Thesis in Chapter 1.
b) In Chapter 2, the concept of state sovereignty and its legal implication. The issues to be discussed are sovereignty over forest resources at the core of international law, important limitations on sovereignty, and international environmental law principles pertaining to protection of forests.
c) Chapter 3 discusses international Environmental law treaty regimes that play important role in the development of global forest law. In this unit, the significant role provisions of CBD, UNFCCC play in forest protection, and the REDD climate mitigation mechanism which is currently developing under UNFCCC will be searched and dealt with.
d) Chapter 4 provides conclusions. The Thesis summarizes the discussions.

1.2 Justification and Objectives

Under international environmental law principles, and the environmental treaty regimes, the erosion of forests ecosystem, in particular the threat to forests across the globe, through deforestation and forest degradation, mandates the international community to scale up what we might think of as national resources into the ranks of centre of global concern. The international community is thus enjoined with the duty to greatly concern and must join responsibility to take steps needed to halt and safeguard forests as the base of essential foundations of life on earth.

Most environmental problems have been observed that they require global solutions and international community have demonstrated their international cooperation through various environmental treaties. These treaties can influence the development of customary law in so far as they establish support for certain basic rules or principles at domestic level. For example, the Vienna Convention on The Law of Treaties states that agreement must be respected (pacta sunt servanda), and states must accordingly act in good faith (article 26).

This entails that states compliance with their duties under international environmental (forest) law is a continuous obligation of fulfilling international obligations under treaties. Such obligations, however, seems lacking in many of developing forest nations, or may be despite the existence of law on protection of forests, its implementation may not gain special attention as opposed to forest conversion. As a result environmental degradation, deforestation in particular, is an ongoing issue that is causing extinction and changes to climate condition.

Nevertheless, the Conventions, such as the Convention on Biological Diversity (CBD), United Nations Frame work Convention on Climate Change (UNFCCC), and the contents of REDD: a forestry based climate mitigation instrument under UNFCCC currently on negotiation should not be overlooked by states, though the provisions of these conventions are conditional in some instances.

This is because it is impossible for states to seek asylum in state sovereignty to destroy forests which is the essential foundation of life on earth as an end in itself. Therefore, to

find instruments and arguments to achieve the decision makings in the direction of the above conventions, it is warranted that forests gain central positions in environmental matters. This is because of forests value and their protection costs in comparison to their conversion, cheap and easy.

Most importantly the ecosystem's sustainability that constitutes the conditions of immense importance for life emanating from forests again warrants due regards to forests and their protection. It also necessitates the above conventions to be interpreted as valid international treaty law which further induces the development of a binding forest law despite currently such rigidly enforceable international forest law with penalty is nonexistent.

This Thesis is, however, designed with objective of making textual analysis as to how international environmental principles: the Rio Principle 2 (Stockholm Principle 21), and conventions such as CBD, UNFCCC, the REDD mechanism, and the secondary rules entailing state responsibility can directly be applied to strike a balance between global approach to protection of forests as common interest and states' exclusive sovereignty over forests as domestic resources.

The following are particular objectives of the Thesis.

I. Legal content and status of sovereign states rights to exploit their resources in accordance with their own national environmental policies (Rio Declaration Principle-2, CBD Arts. 3 – the 'no-harm rule');

II. How the CBD, UNFCCC and the development of REDD under UNFCCC as a global environmental concern raised by global forest decline are coherent with development of international forest law, and;

III. To discuss how state responsibility as a secondary obligation in states management of forest resources; and the human rights apply in protection of forests.

1.3 Methodology

1.3.1 Sources

In the presented Thesis, the researcher used major international legal agreements related to protection of forests such as global treaties-CBD, the 1992 Rio Declaration, UNFCCC; 'soft law' instruments and Human rights conventions. The UN Charter, ICJ cases, text books, Google scholars, legal journals written by highly publicized scholars, and peer reviewed articles are also paid attention and hence thoroughly consulted as main legal sources. Owing to the relatively young age of my study subject, most of the literatures consulted are, however, from the University of Oslo's electronic books, articles and more other writings of different forms. Nevertheless, these sources are academic databases which the University of Oslo pays for. Thus I find them to be reliable sources of information deem consulted.

1.3.2 Delimitations and Limitations of the study

While writing this Thesis, I well know the tremendous importance of the search for laws and the increasing of researches in the area of protection of forests. This is because forests are globally common concerns of prime importance in many regards to be dealt with in this Thesis. The issue of state's sovereignty over forests as national resources and its exploitation as it sees fit, however, exists at important centre of international law and hence puts brakes on the process and progress of speedy realization of the search for laws on the protection of forests. Nevertheless, few international agreements are prevailing as coercive machinery pertinent to the regulation of forest issues. Therefore, though the numbers of applicable framework conventions are substantial, only few of them and treaties with binding nature are to be dealt with as the main legal instruments relevant in the protection of forests.

Conducting a research by collecting data and collating has been the interest of the researcher; time and resources, however, have become the main hindrances to materialize this. Thus the researcher makes pure analytical presentation of various related literatures to bridge the gap.

1.3.3 Significance of the study

The significance of this research:

1. May help as information feed for some institutions that have direct link and legal interest inter alia in protection of forests.

2. Might be used by other scholars who want to conduct further research on the same/related subjects.

3. Any section of the society who is interested in its content and discussion may refer to it as a helpful reference material.

2 States Sovereignty and International (National) Approaches to Protection of Forests

To make an analysis to the domestic and global approach to protection of forests; this research builds upon the existing literatures that discuss issues such as state sovereignty, state responsibility, biodiversity, climate change condition, common concerns etc. An assessment of these existing legal principles is so important in that they serve as benchmarks for immerging international forest law. These hard legal provisions of the international forest regimes exist under different covers such as CBD, UNFCCC and in international customary law. Other issues are subject to soft law.

I argue that the foundation of fundamental rules of international law, such as the relevant international initiatives after the United Nations Conference on Environment and Development (UNCED), held in 1992 in Rio de Janeiro; and the dialogues that have emerged at various layers to address (social, legal, ecological) issues related to protection of forests have legal relevance in uncovering converging expectations and hence normative developments in protection of forests.

2.1 State Sovereignty over Natural Resources-Forests

In international law, the principle of state sovereignty has the implication of both "territorial integrity"-the rule against intervention, and "political independence"-self governing of nation states[1]. These two aspects of state sovereignty entail the prerogative rights that states enjoy over subjects within their national jurisdiction. These rights may include the states exercise of their rights in their territory as they sees fit irrespective of the negative consequences they may bear on the rights of other states. These rights seem absolute and exclusive

[1] Charter of the United Nation: Article 2(4)

The development of International law does not authorize interference with concerns that are considered solely of states internal matters. This statement is affirmed in Article 2 (7) of the UN Charter. Forests, due to their location within the exclusive territory of a particular state, seem to be covered by the provision of this article as state's natural resources over which the state has the right to manage according to its own needs. The exceptional situation in the last statement of Article 2 (7) above, in which case interference with states national issues is allowed by international law does not explicitly include protection of forests.

Traditional international law (the 1933 Montevideo Convention on the Rights and Duties of States) also maintain the privilege of states in managing [forest] resources[2]. Similar provisions are also reflected in Rio Principle 2 (Stockholm Principle 21):

> **States have, in accordance with the Charter of the United Nations and the principles of international law the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies**, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction. (Emphasis added)

This principle embodies the core: states are "in principle", free to decide how to manage their forest resources and utilize; whether and to what extent they will protect their environment. The second statement in the above provision however, requires that states must make sure that their activities at home do not produce significant negative consequences on the environment of others. These two salient features of sovereignty principle in relation to protection of forests outline the two meanings of sovereignty: the rights granted to states and the responsibilities imposed upon them by law.

Explanation of these privilege and accountability associated with sovereignty principle can be employed to enrich the meaning of sovereignty.

[2] Montevideo Convention on the Rights and Duties of States: Article 8.

The right associated with sovereignty (Maguire 2010, P. 32) implies the ability to exercise power over defined area, and citizens with in its boundary, i.e., the freedom of having power to organize and control activities and peoples within the state's boundary. Nevertheless, this exercise of sovereignty in the context of protection of forests global wise is distinctive. At international level, sovereignty implies the equal footing of a state with other states in an international arena. So each state may have their national exigencies to reflect on an international proceeding. "Within the international forestry arena, each state is coming together to protect its sovereign rights in relation to forestry, while accepting that some common standards might be created between all state parties concerning forests."[3]

Therefore, unlike its provisions in the UN Charter, sovereignty in terms of protection of forests at global level does not necessarily entail sovereignty as an inalienable concept in an absolute term. That is to say, when states have common concern which requires common responsibility; for example, shared responsibility in curbing changes in climatic condition, this requires them to reach on consensus. Such instances may soften sovereignty whereby sovereignty entails responsibility. "This new responsibility might either maintain state sovereignty in case where the international obligations are similar to existing domestic legislation, or weaken it where states have to adjust existing domestic laws."[4]

But, this raises an important legal question against the statement in Rio Principle 2: is there an international obligation on a state to protect its own environment? The answer to this question is also imperative. Cassese (2005, p. 487; Birnie, 2009, pp. 128-129; Brunnee 1996, p. 309) observe environment as common public facility (public - in international context), in protection of which all states should have legal and practical interests whether the damage is inflicted where.

[3] Maguire (2010) p. 33

[4] Ibid.

How other states express their interests when damage is inflicted on the environment of one state by the state itself is presented in the 'no-harm rule' the details of which I discuss in the next unit. Nonetheless, the legal implications of this "responsibility" are not vividly stated, no guide lines are convincingly provided (see generally Birnie, 2009 ch.3 sec. 4). Yet, the limitation on sovereignty of states is recurrent in the present discussions of environmental concerns by various environmental law scholars. However, it does not seem to be much invoked consistently because of its exact contents as:

- The balancing of interests between states
- The "due diligence"-care criterion
- The duty to control the activities on its territory
- Strict liability for the harm done, etc.,

The problem of sovereignty principle with regards to the above responsibility contents is crystal clear and it exemplifies that sovereignty over forests as natural resources occupies the heart of international law pertaining to protection of forests. This argument can be interpreted as the threshold when it triggers the applicability of state responsibility is not well established. From forests perspective, in particular, the principle is not firmed as a rule in which strict liability may be established and pronounced upon states that violate the rule.[5] In law, certain conditions must be met in order for the legal rules to be established and executed.

The following are lists of conditions for rules in law made by International Development Legal Organizations:[6]

✓ A set of legally binding rules which are known in advance.

✓ That these rules be enforced in practice.

[5] Ibid, pp.21-22

[6] International Development Legal Organization (2008)

- ✓ That mechanisms exist to ensure the proper application of the rules by properly functioning institutions, and that mechanisms allow for departure from the rules as needed according to established procedures.

- ✓ That conflict in the application of these rules is resolved through the binding decisions of an independent judicial or arbitral body.

- ✓ That there are known procedures for amending these rules when they no longer serve their purpose.

Maguire notes that the above lists of requirements for rule of law are nonexistent in protection of forests.[7] There is, therefore, no legally binding forest law pertaining to protection of forests per se.[8] Maguire continues explaining that international rules related to protection of forests are available only in the form of soft-law instruments such as principle of United Nations Forum on Forests.[9] To uphold the rules or not to comply with is up to states free will.[10] In other words, the rules are not in a form of coercive machinery, therefore, obedience is voluntary. The lack of legally binding international forest rules, therefore, undermines the other requirements discussed above.[11]

The obligations delineated under soft law are relative to the situations in the states. As a result if the states feel that the rules do not fit to the situations such as issues of economic advancement, then the rules will no longer be abided by.

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[7] Maguire (2010) p. 21

[8] Ronnie D Lipschutz (2000-2002) p. 153

[9] Maguire (2010) P.22

[10] Ibid.

[11] However, as it can be observed in Agenda 21 'more systematic consideration of environment'; integration has also been endorsed in principle 13 of the 1972 Stockholm Declaration, and Principle 4 of the 1992 Rio Declaration. Also see Voigt 51, below.

The idea of this statement is also implicated in the 1992 Convention on Biological Diversity (here in after CBD); for example, in articles: 5, 7, 8, and 10 whereby all of these provisions are introduced as "as far as possible and appropriate". Therefore, forest-rich developing countries may argue that it is not appropriate for them (I will discuss this in detail in chapter 3). The principle of state sovereignty is also contained in CBD preamble[12], article 3[13], and article 15[14]. From the dimension of sovereignty as envisaged in this convention and elsewhere in this text, she is not mistaken when Bragdon says, "International law clearly emerged and developed unaware of and seemingly unaffected by global environmental interdependence"[15] This tend to absolve states when they seem generally proved unwilling to grant their protective rights to forests in their exercise of power over their environment. Hence, sovereignty poses insurmountable obstacle to protection of forests.

Nonetheless, this shall not be construed as saying international law pertaining to protection of the environment is irrelevant to protection of forests. This is because; in international law the current concept of protection and utilization of (forests) resources necessitated the redefinition of sovereignty itself and mandated its exercise with a must responsibility. [16] This means that the freedom of states to utilize the forest resources within their national jurisdiction according to their national interests is now being challenged.

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[12]Reaffirming that States have Sovereign rights over their own biological resources

[13] Article 3 Principle
States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

[14] CBD Article 15 (1)

[15] Bragdon H. Susan (1992), P.381

[16] Birnie (2009) P.192

2.1.1 Sovereignty as Responsibility to Protect Forests in the 'no-harm rule'

Environment in general is a common asset; this has the implication that the management of state's own domestic environment in which forests are found is a matter of international concern independently of transnational effects. This triggers the individual state's community obligation i.e. obligation towards all the other members of international community which requires the individual state to observe. Inferentially, the rules of the 'no- harm rule' which found their origin in the principle of good neighborliness are implied.

This conveys the message that the sovereign rights of states to exploit their forest resources as per their national law and policies can be conditioned by other treaty law and other principles of international environmental law such as customary international law (CIL). The CIL as defined in Article 38 of the statute of International Court of Justice (ICJ), which arises from behavior of states towards each other with some sense of obligation (opinio-juris) binds even the third state i.e., a state which is not party to a treaty.

Furthermore, while some may argue that countries have a right to do whatever they want with their resources, the case of forests is a unique one. The biodiversity, the clean air and water produced by rainforests are not exclusive within national borders. The clean air from the Amazon, for example, does not stay locked in within its national borders, but spreads out to and benefits the world as a whole. Thus forests differ from national resources such as mineral or oil deposits, in that it is a common resource. While each country has a right to develop its own industries, it can only do so within the limits of not interfering with the rights of other countries.

This principle which dictates that countries can only develop to the extent that they do not harm other nations was outlined in Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, established in London in 1972, which stipulated that if certain countries condone the dumping of waste into the ocean, other countries may take multilateral action to punish the offending country.

Forests have been proved to have the status of shared natural resources[17]. Consistent with this, in the approaches to achieve sound environmental protection, greater knowledge and understanding of the biosphere and its components is of substantial importance[18]. Environmental problems have also known to have international dimensions.[19] This pressured international community to take holistic approach in response to such multilateral environmental problems[20]. According to Humphreys (1996, P.26) forests use has been internationalized; therefore, forests should be re-defined in terms of their functions including their global functions such as maintaining biological diversity, functioning as carbon sinks, serving as wildlife habitat, home for millions of indigenous forest peoples and providing them with livelihood.

From the international dangers posed to the environment, climate change condition shares significant portion. It is considered as one of the issues involving shared natural resources[21]. Among multiple functions of forests, the use of forests as carbon sinks, and hence mitigating global climate change is the main one. Hence, by a necessary implication forests attract important shares in shared natural resources. This generates the direct application of international regulation of shared natural resources to forests. Without international regulations; shared natural resources; forests in particular, are vulnerable to the 'tragedy of the commons' becoming depleted or exhausted as each State seeks to maximize its own benefit by exploiting the resources.[22]

States should cooperate in the conservation, management, and restoration of natural resources that occur in areas under the jurisdiction of one in (case of forests), or more than one State treating the natural system as one.[23]

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[17] Ibid, P. 193

[18] Shared Resources: Issues of governance Eds. IUCN Environmental Policy and Law Paper number 72

[19] Ibid.

[20] Ibid.

[21] Ibid.

[22] Ibid.

[23] Ibid.

Another reason behind the assumption of forests as shared natural resources lies in the current view of societies about forests. As opposed to earlier thinking, the present understanding of society about forests is dominated by the view that forests are biologically rich but highly sensitive to depletion with limited capability of regeneration.[24]

On the ground, there are countless lobbies and financial supports for advocating protection of forests by members of the international community including the UN members. It is also noted that forests' important biological wealth is in the canopy, not in the soil[25]; and hence intensive exploitation alters them in to non-renewable resources[26]. The destruction of forests in such a way has a potential of jeopardizing the biodiversity, and the climate system. Fail to take action, we will fail to protect the biodiversity and stabilize our climate system. The scientific information is legally relevant and supported in treaties:

The 1991 Convention on Trans-boundary Environmental Impact Assessment, the 2003 Protocol on Strategic Environmental Assessment, UNEP'S EIA Goals and principles, CBD article14, article 3 and 8 of the 1991 Protocol on Environmental Protection to the Antarctic Treaty, Principle 17 of the Rio declaration, and other legal instruments. Accordingly, "Science counsels that these resources should be conserved and managed to sustain a variety of commodity and non commodity uses".[27]

Therefore, forests have come to be conceived as valuable bio-reserves, extractive reserves, and carbon sinks[28]. This fairly contributes to and consolidates the embedded assumption in forests as useful shared natural resources. Furthermore, the threat to forests by accelerating deforestation (i.e., a permanent decrease in forest cover) and

[24] Tarlock (1997) P. 3

[25] Donald R. Perry (1990) PP. 25-29

[26] Cheryle S. Silver & Ruth S. Defries (1990) P. 120

[27] Tarlock (1997) P. 3

[28] Ibid, P. 4

forest degradation (i.e., a quality decrease related to factors like vegetation layer, fauna, and soil, or the loss of carbon stocks on remaining forest land) by forest-rich sovereign states, among others, led to the recognition of this world wide causes and effects globally.[29] This also, arguably, extends to forests, the rank of global shared resources and propels its protection accordingly.

The 1974 Charter of Economic Rights and Duties of States in its article 3 stipulates:
In the exploitation of natural resources shared by two or more countries each state must co-operate on the basis of a system of information and prior consultation in order to achieve optimum use of such resources without causing damage to the legitimate interest of others. This article along with the UN General Assembly resolution 1973 (Resolution 3129 XXVIII) and other soft laws pertaining to protection of forests could help striking a balance between national and international interests in forests.

Currently, a number of principles signaling an increase in recognition of forests as shared resources which entails shared responsibility are emerging. These principles along with the customary international laws such as the 'no-harm rule' undermine the power of sovereignty and can serve as cornerstones in forming international forest law.

However, Tarlock observes that "classic international law precludes the development of effective direct international legal restraints because it effectively shields internal policies, such as natural resource management decisions from external standards regardless of the international spillover"[30] But this does not mean that the present international legal system is quite about it. It is arguably believed that international law is currently playing its role and making greatest contribution by setting rules, principles and standards which can influence and reinforce both domestic and international conservation policies. These include setting basis for international and domestic sanctions as standard of action against the adoption of destructive national forest policies.

[29] Brunnee, (1996) PP. 307-314

[30] Tarlock (1997) P. 5

Birnie (2009) posit that sovereignty does not out rule customary international and treaty laws protecting forests while limiting sovereignty.[31] They further argue that principle of permanent sovereignty does not preclude the protection of forest resources within a state's territory as common concern.[32] They do not, however, undermine the concept of sovereignty holding central position in rights and duties of states. In fact I also agree with the importance of sovereignty principle as the norm that puts a state at equal footing with other states in the world arena. Its enunciation in Stockholm principle 21, Rio principle 2, and articles 3, and 15 of CBD also exemplifies this.

Schrijver puts "It is clear that sovereignty has become pervaded with environmental concerns".[33] This sentence can be construed as prove of prevalence of concerns for protection of forests along with states sovereignty. Hence, in context of sovereignty over forest resources in the territory of a state, sovereignty can be perceived as both privilege and responsibility. Thus, state sovereignty under the general circumstances vests states with authority to value their freedom to do as they please with their own forests.[34] At some specific situations, for example, when a state's exploitation of its forest resources endanger the rights of other states, however, an obligation to take appropriate measures to prevent or minimize significant harm is imposed upon them by law.[35] The general principles under Rio Principle 2 (Stockholm Principle 21) indicate global community's right to interfere when one state policy affects interests of other nations.

This implies the recognition that in the event of national activities endangering the wale fare of citizens outside national boundaries, the global community has the right to enact policies restricting the destructive behavior of individual states. In my understanding, the reason for the international community's involvement is that, reports on the negative

[31] Birnie (2009) PP. 191-192

[32] Ibid, P.192

[33] Schrijver, Sovereignty over Natural Resources, 250 In: Birnie (2009) P. 192

[34] Birnie (2009) P. 193

[35] Ibid.

impacts of various developmental schemes of forest-rich developing states on global environment is undisputed.

This is why the concept of 'sustainable development' has been widely discussed by many environmental legal scholars as the best resolution. Given this, it holds true that the international community is noticing these schemes being employed under the norm of sovereignty of states which infers that although such schemes are done with in a border of a particular state, the international community is starting to feel its interests in a healthy and safe environment are threatened.

Thus, interference with a country's national issues regarding the management of its forests is a norm allowed by the rules of the 'no-harm rule' as enshrined under the above Rio and Stockholm principles. Under these rules, it seems fair to assume states freedom of exploiting forest resources in their territory as a general rule; whereas, the interference by the global community may be assumed as the "no- harm rule"- i.e. the principle of good neighborliness for the common good of all.

Consistent with this, (Brunnee, 1996, p.309) observes that the interference with states sovereignty over forest resources in their national jurisdiction has to be generated only when the manner in which these states exploit their forests affect the interests of others. This is indeed a sensitive issue which requires the most delicate negotiations among states.

My argument is, the 'no-harm rule' does not only recognize the international community's interference with states internal forests management, but it also acknowledges the sovereignty norm as a right giving norm to states' exploitation of their forests; in fact, only to the extent that this exploitation does not affect others environment. I indicated that the case of forests is a unique one.

Therefore, if a country's developmental efforts do harm to the environment shared by citizens elsewhere, as it can be the case in forests exploitation, then this generates to the international community, the right to demand behavioral change from the 'polluting' state. This in turns has the legal repercussion which enjoins a state with a duty to abide

by the world community's demand. In summary, the application of the 'no-harm rule' is that deforestation and forest degradation cause harm to other states; for example, by aggravating changes in climatic conditions and disturbing biodiversity. Therefore, states are under obligation to refrain from such harm but not from cutting down forests.

There, the bottom line in the concept of the 'no-harm rule' is, it is not the forests as resources confined within the limits of a state which qualify sovereignty but the uses of forests which scale up forest decline and pose threat to the international community. In other words, the limitation of sovereignty is not an impediment to states as owners of forest resources, but when its uses affect the rights of others, it is.

2.1.2 The Human Rights Repercussions of Protection of Forests in State Sovereignty

The Human Rights implication of protection of forests is that in Human Rights; the issue of forests was impliedly addressed. In this context, the rights of people to a healthy and quality environment pertains to protection of forests. Accordingly, if the rules are to be amended in such a way; it does not preclude the reference of the rules to protection of forests. Today, protection of forests right is no less important than economic or social rights: "Many human rights are suited to being applied from an ecological perspective, whether those rights are political, civil, social, economic or cultural, and whether they are exercised individually or collectively."[36]

This paves the way to provide criteria to properly enforce the obligation derived from a decent, healthy, or sound environment. This includes privileging environmental quality giving a value equal to and comparable status to other rights such as development rights. Civil and political rights are necessary preconditions for mobilizing environmental issues, and making claims to protect the environment effective. Nonetheless, the sovereignty principle in the context of forest-rich sovereign states undermines these rights when it allows exploitation of forests as the states see fit.

[36] Environmental Rights Report (2005) p. 243

Accordingly, the first victims of climate changes or any other dangers posed to the environment due to forests exploitation are local peoples and the citizens of the states. [37] For example, the decline of forests due to deforestation and forest degradation affects the poor forest peoples, more specifically and immediately. The IACHR and CIDH have interpreted the rights to life, health and property to afford protection from environmental destruction and unsustainable development.[38]

Collective rights empower peoples to determine how to develop their environment and natural resources such as forests and its management. The African Commission of Human Rights held that the peoples´ right to a general satisfactory environment favorable to their development[39] imposes an obligation on the State to take reasonable measures "to prevent ecological degradation and secure ecologically sustainable development."[40] In addition, the peoples´ right to the best attainable standard of health[41] included:

> Ordering independent scientific monitoring of threatened environments, requiring and publishing environmental and social impacts studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities.[42]

However, due to the concept of state sovereignty which states value as their freedom to do away with the resources confined in their territory as they see fit, in majority of the developing countries, particularly in forest-rich sovereign nations, environmental impact assessments, arguably, may not be undertaken in practice or at least do not reverse a planned project to take effect. This seriously infringes the rights of forest dwellers, and the effects also transcend the boundary and interfere with other states'

[37] Michael, (1996) p.4-5.

[38] Maya Indigenous Community of the Toledo District v. Belize,(2004)

[39] ACHPR, Article 24

[40] Ogoniland Case (2002) pp. 52-53.

[41] ACHPR, Article 16

[42] Ogoniland Case (2002) p. 54

interest in protection of the environment. A relevant international case with this is the international obligation to conduct an environmental impact assessment: the International Court of Justice (ICJ) case concerning Gabcikovo-Nagymaros project. In this case ICJ found: "The project's impact upon […] the environment is of necessity a key issue […] the Parties together should look afresh at the effects on the environment of the operation of the Gabcikovo power plant"[43].

Weeramantry-the former vice president of ICJ; in his separate opinion, affirms:
"It is thus the correct formulation of the right to development that that right does not exist in the absolute sense, but is relative always to its tolerance by the environment."[44]
Weeramantry further suggests:

> The right to development and the right to environmental protection are principles currently forming part of the corpus of international law. They could operate in collision with each other unless there was a principle of international law which indicated how they should be reconciled. That principle is the principle of sustainable development which, according to this opinion, is more than a mere concept, but is itself a recognized principle of contemporary international law.[45]

In relation to the protection of the environment, he convincingly demonstrates:

> [It] is […] a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.[46]

Therefore, states (including developed countries) must respect this core of international value from which no countries, no matter how great its economy and military strength, may deviate.

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[43] Gabcikovo-Nagymaros Project (Hungary/Slovakia, ICJ 1997) p.7-8

[44] Hungary/Slovakia (1997) Sep. op. Weeramantry, p.89

[45] Hungary/Slovakia (1997) Summaries of Judgments p.8

[46] Hungary/Slovakia (1998) Sep. op. Weeramantry, p.88-89

Weeramantry posits:

"There is a duty lying upon all members of the community to preserve the integrity and purity of the environment."[47] He also believes that:

> I believe a distinction must be made between litigation involving issues inter partes and litigation which involves issues with an erga omnes connotation. When we enter the arena of obligations which operate erga omnes rather than inter parties, rules based on individual fairness and procedural compliance may be inadequate. […] International environmental law will need to proceed beyond weighing the rights and obligations of parties within a closed compartment of individual State self-interest, unrelated to the global concerns of humanity as a whole.[48]

In this opinion, it is possible to infer that Weeramantry gives the duty to preserve the integrity and purity of the environment erga omnes character.[49] Therefore, developed countries should need assurances of openness, transparency, and that the fund to developing states will be used in appropriate manner so that the environment will not be damaged, the forests will not be destroyed, and the community will not be affected while a state exercises its sovereignty. Birnie (2009) uphold this idea; they state:

> While obligations of global environmental responsibility may have an erga omnes partes character, in the sense that they are owed to all states acting through collective institutions of treaty supervision, in the Nuclear Test Cases the ICJ was unsympathetic to the notion of an actio popularis allowing high seas freedoms to be enforced by any state, and it did not follow its earlier dicta.[50]

This leads one to holding the view that this decision does not deny the difference made by Weeramantry. The ICJ was unsympathetic with the possibility of litigation through actio popularis on issues which involves an erga omnes character. Yet, it does not deny the erga omnes character of the obligation lying upon the international community to preserve the integrity of the environment. Neither does it affect the nature of the

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[47] Ibid, p.107

[48] Ibid, p.114

[49] Belgium v. Spain (2nd phase) (Barcelona Traction case), 1970 ICJ § 33

[50] Birnie (2009) p.233 Birnie refers the Nuclear Test Cases. Australia v. France; New Zealand v. France (1974) ICJ Reports 253, 475. (The ´earlier dicta` was in Gabcikovo-Nagymaros Case).

coherent cooperation that the international community deems to pay attention when the global environment, forest in particular, is threatened.

The gist of this argument is that ICJ was unsympathetic to actio popularis when global environment is under threat. Nevertheless, it maintained the ergaomnes character of the right and duty all states have in common in protecting the environment, (forests) in the context of this paper. The realization of this obligation that is included within the human rights to a healthy environment could provide a coherent answer to the international community with reference to forest protection. States should not recognize as lawful, forest regulation based on unsustainable levels of its utility.

States should collectively bring it to an end by lawful means. This concept of sustainable utility is echoed in sustainable development as a normative frame work which in turn is coupled with sustainable environmental protection[51]. However, it does not explicitly include protection of forests in the context of human rights. Nevertheless, forests, due to their climate change mitigation capacity, represent our health, the quality of our life, and the living space for generations including the generations not yet born.

To achieve sustainability in the quality of our life, and to realize the right to a healthy environment obligation which is included within the human rights instruments, protection of forests is a must requirement that forest-rich sovereign states must observe. Otherwise, if states because of sovereignty principle continue to exploit forests as they see fit; this may aggravate climate change, and hence suffocation may affect human health, and endanger forest biodiversity on which humans rely on in many ways to earn their living. This will definitely interfere with, and undermine all the human rights enshrined under the 1948 Universal Declaration of Human Rights (UDHR) and other human rights documents.

[51] Voigt (2009) p. 36

2.1.3 Important Limitations

The limitations on states sovereignty argument dictate the limitations on hitherto exclusive state sovereignty (abuse of rights or territory) to forest destruction. This indicates that national forest management policies and laws will no longer be an exclusive domestic matter of states. The principle of state sovereignty can be rebutted by customary international law and by conventions where a state enters into an international treaty regime on the environment that is:

- By way of state agreeing to international treaty or national law to protect its physical environment;

- Sovereignty here equates with independence and equality; and hence the rule of international law binding upon the state emanates from its own free will as expressed in conventions (by way of customary international to states non-party to any of such conventions).

This exemplifies the increase in the internationalization, and to certain extent globalization of forests and its protection. Bragdon is optimistic about this when eloquently addresses the political boundaries as having little or no meaning with respect to harm done to the environment[52]. That is to mean the interwoven international problems pose difficulties to the national sovereignty oriented governance. Therefore, international phenomenon like forest depletion demands global approach to its protection. However, there are arguments by non legal scholars. They argue that it is only the international legal scholars who tend to believe that international law affects states conduct and that it can usefully be deployed to address serious environmental problems among nations. And for others venturing outside the comfortable community of international legal scholars, that belief is challenged and remains a matter of discussion.

[52] Bragdon (1992) P. 381

However, the international environmental legal system is quite not like that. It does not also imply that it remains almost entirely without effect and thus it has simply become a debating stage. As states though sovereign, by their own interest and or by customary international law bound by conventions; there are such legal systems as the 'no-harm rules', the World summit on sustainable development (WSSD), the convention on biological diversity (CBD), the frame work convention on climate change (UNFCCC) etc., are all there to help prevent such acts of individual states violating treaties and customs.

Moreover, the adoption of international agreement alters the national legal and policy instruments for it compels a country to adjust its laws and policies accordingly. This also indicates the limitation on the state's right and entails responsibility. The second part of the 1992 Rio Forest Principles 1(a), mandates states to think beyond consequences within a state boundaries and consider all negative consequences to ensue from their action. The states mandate under this principle is that states "do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction".[53]

This principle confirms the traditional normative framework which states that nations have sovereign rights to exploit their own resources pursuant to their own national law and policies. It however subjects them to the obligation not to cause injury to others. Overall it indicates the existence of international duties along with domestic privileges. This qualify sovereignty; i.e., with its objective of conserving and protecting the natural environment, it infringes the rights of states to deal with their natural resources in which they sought to achieve their national exigencies.

Maguire suggests the sovereign rights of states and the obligations to ensue thereto, as divergent but one always standing along the path of the other with their interaction seemingly a confusing picture[54]. Her argument seems that state sovereignty could not be served as justification states sought not to comply with their duties under forest

[53] Maguire (2010) P. 50
[54] Ibid.

protections when the later is at stake. True; no doubt, if sovereignty lies along the line of development of negotiations pertaining to protection of forests, it hampers such agreements from having potential to influence states behavior.

Humphreys, well notes this saying "sovereignty is a legal fiction which has always been compromised by transnational economic and social forces with assertions of sovereignty serving to insulate the state from the international environmental effects of its policies".[55] Mickelson also observes the difficulty of changing the long lasted attitude on sovereignty over forests and hindrances in side-stepping it to materialize laws on protection of forests. He argues:

> An essential difficulty that arises in the context of developing a forest convention is that of avoiding the perception that such an agreement constitutes an infringement of sovereignty. In fact if an instrument on forests is qualitatively different from previous international instruments in the environmental area it is precisely because its potential impact on sovereignty over resources appears to be much more direct.[56]

Indeed, the agreement bears potential impact on sovereignty. Nevertheless, the impact should be interpreted positively. This is because if states use state sovereignty as shields to the ends of their national exigencies as Humphreys above movingly suggested, their obligation to the challenges currently facing the international community; namely: global forest decline, loss of biological diversity, and above all, the pressing issue of changes in climatic condition, will never be complied with. Consequently, sovereignty continues to risk the environment, threat species, aggravate changes on climatic condition, and disturb biodiversity. Therefore, striving to create a binding international legal instrument with objectives in protection of forests is a rather best option that limits sovereignty and allows states to make aggressive response to halt losses of our real resources.

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[55] Humphreys (1996) P. 171

[56] Mickelson (1996) P. 248

2.1.4 State Responsibility

The international law provision which prohibits countries doing harm to each other has now become customary rule of international law[57]. These customary rules are reinforced by many principles observed as customary obligations[58], and treaties such as UNFCCC[59]. The prohibitions under these rules entail State responsibility. Sompong observes that:

> The current notion of State responsibility is a comprehensive regime of the law of obligations, covering general principles of states' international responsibility, including primary rules that establish all types of internationally wrongful acts attributable to a State and secondary rules that flow as a legal consequence from a State's breach of an international obligation, regardless of its origin".[60]

Impacts of global forest decline because of deforestation and forest degradation by forest-rich countries fall under this rule. The main focus of international environmental law today is on the prevention and control of environmental harm. [61] Sustainable and wise use of natural resources and ecosystem among which forests form significant share is also subject of its protection. To ensure the realization of its protection, compliance by States and enforcement of the rules, international law puts responsibility on States.[62] Accordingly, the concept of the State responsibility encompasses wider range of enforcement of international obligations pertaining to protection of the environment and prevention of transnational environmental damages.

A famous case between the United States and Canada[63] concerning the activities of the Canadian smelter located in Trail, British Colombia, for example, is an important element of State responsibility. In this dispute, the arbitral tribunal asserted a general

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[57] S. J Tol Richard (2004) P.1110

[58] Birnie (2009) P. 214

[59] Ibid, n 57 above.

[60] Sompong (1995) p. 828

[61] Birnie (2009) P. 212

[62] Ibid, P. 111

[63] Cassese (2005) P. 484

duty on the part of a State to protect other States from injurious acts by individuals within its jurisdiction. The arbitral tribunal recognized the responsibility of a State for the acts of non-State actors as well as those of the State or its organs.

The tribunal found that "'[…] no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence'".[64] The *Trail Smelter* arbitration is the first case of its kind to set foundations for discussions of State responsibility in environmental concerns. After the *Trail Smelter* case, a general duty to avoid trans-boundary injury is again asserted by ICJ in the 1949 *Corfu Channel*[65] case.

In this case ICJ found that it is "every State's obligation not to allow knowingly its territory to be used contrary to the rights of other States".[66] The decisions rendered in these two cases find relevance to protection of forests in that the exploitation of forests by a State in an arbitrary manner is against the law that forbids State's use or its permission of the use of its territory contrary to the rights of other States.

In international law, states are responsible for violations of international environmental law and are obliged to compensate the indirectly or directly affected states for the damage caused.[67] This rule forms the gist of the law of state responsibility. There are also rules that provide authoritative statement of the existing law[68]. Such rules are codified in 2001 by the International Law Commission (ILC, "Draft Articles on Prevention of Trans-boundary Harm from Hazardous Activities"). These rules are in some cases reiterations of the 1992 Rio Declaration on Environment and Development

[64] Ibid.

[65] Corfu Channel Case (Merits) U.K v. Albania, 1949 ICJ

[66] Ibid.

[67] Ibid, n 63 above.

[68] Birnie (2009) P. 141

principles outlawing trans-boundary environmental injury, for example, principle 2 which states:

> *States have*, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, **and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.** (Emphasis added).

The rules developed by the ILC have reflected this inter alia in its article 3.[69] This rule has legal bearings as evidenced in the legal language it employs. Therefore, they can serve as useful tools to examine the conditions and consequences of damages inflicted by a state on other states. This should include establishing responsibility for climate change damages caused by global forest decline due to deforestation and forest degradation by the forest owner states.

2.1.5 Trans-boundary Cooperation

The rule of international law that calls on states to cooperate on environmental matters is usually stated in general terms. Under UN Charter, article 1 (3) provides that "To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, […]". This general obligation can also include some specific commitments. These incorporate relevant provisions enunciated inter alia under ILC's Draft Articles on Prevention of Trans-boundary Harm from Hazardous Activities; namely: the duty to take appropriate measures to prevent or minimize the risk of trans-boundary harm or to minimize its effects (Article 3); the obligation to cooperate to its effect (Article 4); the duty to notify and consult the states likely to be affected by the harm with a view to agreeing with measures to minimize or prevent the risk of harm (Articles 6 and 7).

The provisions are also delineated under the 1992 Rio Declaration on Environment and Development Principles: 2; 7 and 14; and 19 respectively. Birnie (2009) consider the basic proposition that states must co-operate in avoiding adverse effects on their neighbors through a system of notification, consultation, impact assessment, and

[69] Global And European Treaties (2007) p. 1874

negotiation appears generally to be endorsed by relevant jurisprudence, the declarations of international bodies, and the works of ILC.[70]

They believe it also enjoys important relevance in state practice, based on Gabcikovo-Nagymaros Project, and the Nuclear Test Advisory Opinion cases.[71] Since Birnie (2009) state that an obligation for states to cooperate with each other to curb trans-boundary environmental risks is widely recognized, this obligation does not preclude global forest decline; but rather have direct legal bearings on it. Because the obligation to cooperate, notify and consult is considered to be obligation of customary law and the forests being shared natural resources triggers accountability of the forest-rich states to the international community.

Birnie (2009) eminently stress: "It is beyond serious argument that states are required by international law to regulate and control activities within their territory or subject to their jurisdiction or control that pose a significant risk of global or trans-boundary pollution or environmental harm".[72] Consistent with this, forest-rich countries can be held accountable if they refuse to co-operate in trying to prevent and stop over exploitation of forest resources in their respective jurisdiction.

Article 5 of the CBD also puts on states the duty to cooperate, directly or through international organizations concerning areas beyond national jurisdiction. Though this seems too general to generate liability for trans-boundary harm, it shall not be served by states as lacunae to disregard the possible trans-boundary consequences of their actions. Because Article 14[73] of the same convention in particular, mandates parties, albeit qualified with 'as far as possible and appropriate', to make impact assessment and minimize its effects.

[70] Birnie (2009) P. 140

[71] Ibid, P. 139

[72] Ibid, P. 143

[73] CBD , Article 14 (1) (b)

2.2 International (National) Approaches to Protection of Forests

The climate summit in Copenhagen, December 2009, was arguably, the first of its type for all states, big and small, to practically get together and discuss forest issues. If I am to borrow one more statement from one of my environmental law subject professors- Christina Voigt lectured it as "the first conference of new world order; it meant Europe was sidelined, developing states have an extremely strong voice". Though it ended as "disappointing", the summit has helped in setting of parameters for protection of forests in national policies and laws.

These national approaches should also be in consonant with international policies in protection of forests. Accordingly, numerous sovereign states are now preparing their forest protection projects. Nevertheless, the lack of agreement seems to obscure what the collaboration between developed and developing countries is trying to achieve. However, this does not mean that there are no rules on protection of forests and hence its issues remain in vain. When states violate the primary rules pertaining to protection of forests such as the rules under treaties: namely CBD, UNFCC, and other customary international laws; the secondary rules under which states both nationally and internationally assume responsibility shall apply. Such rules include the principle of common but differentiated responsibility which requires states to place national environmental problems in a global context.

2.2.1 The Principle of Common but Differentiated Responsibility

The principle of common but differentiated responsibilities (CBDR), agreed on at the 1992 Earth Summit requires both industrialized and developing countries to place national problems in a global context and to ensure that national activities do not cause any global or regional damage. This approach addresses both the national and the international factors behind deforestation and forest degradation and ties national sovereignty to global common interests. I.e., under this principle states are internationally responsible for the consequences of their act of deforestation and forest degradation; and their sovereignty does not absolve them from accountability under international environmental law.

2.2.2 The Main Aspects of the Principle

State responsibility is clearly enshrined under the principle of common but differentiated responsibility. Hence, duty to put a stop to the deterioration of the global forests is a common responsibility of the sovereign states. Within the meaning of this principle, however, it is erroneous to assume that international law always treats all states equally.

True, it is critical that the community of sovereign states arrives at a common goal in protection of forests and participates effectively in its achievement. Yet the international community encounters increasing disparities between and within nations. For example, the worsening of poverty, in most parts of the developing countries, puts significant restraint on states' crafting a common legal platform for environmental measures in general - UNFCCC art.4(7). Therefore the main aspect of the principle resides in defining equitable balance between developing and developed states by setting differences in environmental standards for the two nations in discharging their obligations; and the obligation to cooperate i.e., transfer of resources and technology as a solidarity assistance the developed states owe under the law – Rio Declaration Principle 7.

2.2.3 Common Responsibility

The 1992 Climate Change Convention (UNFCCC) and the 1992 Biological Diversity Convention (CBD) in their preamble acknowledge the earth's climate change and conservation of biological diversity respectively and equate their protection with a common concern. Protection of forests has significant role to play in avoiding adverse effects on these common concerns. The concept of common responsibility in common but differentiated responsibility (CBDR) in relation to protection of forests suggests equity consideration**.** Accordingly, to qualify a state's over exploitation of its forests because forest decline raises question of "common concern" (climate change or loss of biodiversity); the other international community of states' rights should also be linked to responsibility which is rooted in the principle of co-operation.[74]

[74] Rajamani (2000) P. 121

In other words, forest decline should not be conceptualized as the sole responsibility of forest- rich developing states. The consequences of forest destruction by forest-rich sovereign states affect all nation states would mean the protection should receive concerted efforts; that means that developed and developing countries share the burden of halting forest decline. Now it can be argued that the principle of common concern in CBDR not only vests international community with rights to demand forest-rich countries compliance with the obligations they assumed under international law, but also generates possibly, corresponding responsibilities to all other concerned states as well.[75]

However, the principle of CBDR itself is only morally binding (authoritative statement); its legal content as binding customary international law is disputed.[76] Forests themselves being common concerns also necessitate their protection as common responsibility. *Sands*, eminently notes that "the legal interest which a state has can be translated in to a legal right of equitable access to, and use of, a particular environmental resource, and a legal responsibility to prevent harm to it".[77]

In the forests context this would mean that concerted financial and technological assistance from developed countries is a necessary harmony of interests with forest-rich countries to forgo the exploitation of forests. This enables both developed and developing states equally motivated by understanding of such mutual self interest, and work in tandem in pursuit of this common goal. The UNFCCC Article 4 (1, (c), 4 (3) and Rio Principle 7 exemplify this. With the absence of this solidarity assistance as responsibility of the developed states; the overriding issue of poverty alleviation is a compelling reason for the forest owner developing states not to prioritize protection of forests (UNFCCC Article 4(7), CBD Article 20(4), Agenda 21, C.17.2, etc.

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[75] Tuula (2009) P. 257

[76] Ibid, P. 259

[77] Sands (1994) P. 296

On the first read of these provisions, however, one may assume protection of forests should be stopped until the poor forest nations become rich. Nevertheless, in protection of forests, given the threat to the world climate by deforestation and forest degradation among others, developing countries should not cite the provisions as licenses to do away with their responsibilities. Indeed, the provisions have indicated differentiation in responsibilities as I will discuss below. Nonetheless, "It was never intended to be a justification for allowing developing states to dump pollution on each other"[78]. Neither do the developed states' obligations of cooperation enunciated under these provisions only necessary, but decisive and mandatory. Thus, international (environmental) law ties all states, big and small with common responsibility; in fact with differential treatments.

2.2.4 Differentiated Responsibility

Differences exist between sovereign states of the world. This is at least clearly standing in terms of economic advancements between nations of the world. The "war" against poverty eradication is the primary and overriding strategy of the forest-rich developing countries. On the other hand, combating deforestation and forest degradation to halt forest decline is a "common concern" of all states. Nevertheless, this use of environmental control should not prohibitively restrict the economic growth of the developing states. An equitable measure is therefore, the asymmetrical obligations for developed and developing countries which have become the norm in international environmental treaties.[79]

Rajamani posits that "the notion of differentiated responsibility drives from both the differing contributions of States to climate change and the differing capacities of States to take remedial measures".[80] Accordingly differentiated responsibility places differentiated environmental standards on various states. Coherent with this, Birnie (2002) explain that developed countries historically have contributed much to changes

[78] Birnie (2009) P.136

[79] Yoshiru M (2007-2008) P. 848

[80] Rajamani, (2000) P. 121

in climatic conditions. And they have greater technological and economic capacity in the process of correcting it.[81] On the other hand, A.M Halvorssen (2006) argues that the contribution of developing countries to climate change has been insignificant; and thus, they have remained vulnerable to its impacts because of lack of resources to curb the problem.[82]

Both Birnie, and A.M Halvorssen put major blame on developed states, and accordingly link them with primary responsibility to deal with the matter. Lower standards, and more favorable treatments have however been imposed on developing states also. Consistent with this, Rajamani[83] lists important provisions of international environmental law dealing with such differential treatments:

- provisions that differentiate between industrial and developing countries with respect to the central obligations contained in the treaty, such as emissions reduction targets and timetables;[84]
- provisions that differentiate between industrial and developing countries with respect to implementation,[85] such as delayed compliance schedules,[86] permission to adopt subsequent base years,[87] delayed reporting schedules,[88]
- and softer approaches to non-compliance;[89] and, provisions that grant assistance, *inter alia*, financial[90] and technological.[91]

[81] Birnie (2002) P.101

[82] Anita M. Halvorssen (2007-2008) P. 849

[83] Rajamani (2006) PP. 1-2

[84] E.g. Art. 3, Kyoto Protocol, 1997.

[85] E.g. Preambular provisions of the Convention to Combat Desertification, 1994; FCCC, 1992; Convention on Biological Diversity, 1992; the Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and Their Disposal, 22 March 1989, 28 ILM 657 (1989); and the Montreal Protocol on Substances that Deplete the Ozone Layer. 16 September 1987, 26 ILM 1550 (1987).

[86] Art. 3(5), Kyoto Protocol, 1997; and Art. 5, Montreal Protocol, 1987.

[87] E.g. Art. 5(3) (a), Montreal Protocol, 1987.

[88] E.g. Art. 2 (5), FCCC, 1992.

[89] E.g. Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol, in 'Report of the Conference of the Parties on its Seventh session, Addendum. Part two: Action taken by the Conference of the Parties at its Seventh Session', Volume III, FCCC/CP/2001/13/Add.3 (2002).

D.S Christopher[92] also makes similar notes of the differential treatment provisions. Accordingly:

> An agreement can make differential substantive requirements;[93] subject some parties to a more favorable compliance timetable; permit special defenses?[94] make noncompliance, if not forgiven, overlooked;[95] or afford qualified nations financial and technical contributions,[96] or as a precondition for their own participation.[97]

It now seems fair to assume that international environmental law can best play its role in protection of forests when introduced with differentiated responsibility. The responsibility is seen as more equitable and well acceptable for developing forest countries as well. This forest context differentiated responsibility implicates that there

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[90] E.g. Art. 13(2) of Stockholm Convention on Persistent Organic Pollutants; Art. 20(2), Convention to Combat Desertification; Art. 20, Convention on Biological Diversity; and Art. 4(3), FCCC.

[91] E.g. Art. 16 Convention on Biological Diversity; Art. 4, FCCC; Art. 18, Convention to Combat Desertification; Art. 27(2), International Tropical Timber Agreement; Art. 4(2), Vienna Convention; Art. 10(3), Basel Convention; and, Art. 10A, Montreal Protocol, 1987.

[92] Christopher D. Stone (2004) PP.276-301

[93] Kyoto Protocol, supra note 2; infra text at note 23. Kyoto Protocol Annex I parties have a joint goal (reduction of 5% of 1990-level emissions by 2008-2012), but the allocation required to meet the joint target is negotiated inter se and varies. Non-Annex I parties currently have no obligation to commit themselves to quantity limits. Annex II parties have further special obligations beyond those of other Annex I parties relating to the provision of financial resources, technology transfer, and capacity building.

[94] Article 5 of the Amendments to the Montreal Protocol, supra note 1, while not adopting the term "CDR" or a cognate, requires industrialized countries to halt production and import of chlorofluorocarbons (CFCs) in 1996, while developing countries, identified by their low levels of CFC and use (<0.3 kg per/cap), are given until 2002to eliminate 50% CFC production and consumption, 2007 to eliminate 85%, and 2010 for complete elimination.

[95] LOS Convention, supra note 1, Art. 71 ("The provisions of articles 69 and 70 [establishing fishing rights for land locked [e.g., Ethiopia], and geographically disadvantaged states] do not apply in the case of a coastal State whose economy is overwhelmingly dependent on the exploitation of the living resources of its exclusive economic zone.").

[96] Daniel Vice (1997) ("State governments may feel that they can ratify... [environmental] treaties without fulfilling all of the treaty obligations, presenting the public image of an environmental commitment without having to dedicate resources to implementation

[97] Article 4(7) of the FCCC, supra note 1, suggests that "[t]he extent to which developing country Parties will effectively implement their commitments ... will depend on" receipt of financial and technology transfers from the developed country parties. Article 20 of the CBD, supra note 1, adopts the same requirement.

should be some provisions need to exist and guide the financial and technological assistance from developed states to developing states.

Equally important is that these provisions entitle the developed states to have a strong say on the manner of exploitation of forests by the forest-rich nations. Meanwhile, the provisions enable the developing states to renew their efforts in their commitment to protect the forests-common concern of nation states; and to observe the obligations they assumed under the law.

Humphreys (2006)[98] can be well credited on this. He broadly discusses:

> A framework of differentiated responsibilities could, in principle, allow for developed states to acknowledge an obligation to assist tropical countries through financial and technology transfers, in exchange for a commitment from tropical forest countries to acknowledge an obligation to conserve an agreed area of forests. It is possible that the Non-Legally Binding Institution (NLBI) negotiations could lead to a bargain whereby developing countries acknowledge the principle of technology transfer through the market, in exchange for which developed countries agree to create a fund made up of voluntary contributions so that technology can be transferred at prices that are discounted below market prices.

This fairness element of negotiation has a possibility of leading the road from NLBI agreements to potential international forest regime. It simply becomes the crux of the matter in enhancing legitimacy and states' adherence to its provisions.

[98] Humphreys (2006) P. 26

3 International Treaty Regimes Applicable to Protection of Forests: Emergence of International Forest law

Forests were one central topic of the 1992 UNCED. However, there has been no coherent international forest legal regime that has aimed at their protections. I.e. "[…] yet there is not binding international agreement on forests".[99] The instruments adopted to date are not hard law.[100] In Rio, however, there have been conventions coming into existence on forests which are recently justifiably critical. These are conventions on forests for the sake of climate change, and loss of biodiversity. Protection of forests as global carbon cycle under UNFCCC, and for biodiversity conservation under CBD is the subjects of discussion in this chapter.

Other than in these two treaties, today's forest governance seems to remain as fragmented conglomerate of different conventions and forums. *Brunnee*, well summarize this saying "International forest law remains an underdeveloped area of law"[101] Nevertheless, the intersection of consequences of forest decline with issues of biodiversity and changes in climatic conditions makes protection of forests not a matter of necessity, but obligation. Consequently conventions on biodiversity and climate change integrate forests and their protection into their portfolio.

3.1 Protection of Forests in CBD

Because of its specious- rich biosphere, protection of forests has become the core concern of biodiversity conservation. Forests are "central to global efforts to maintain

[99] B. Katrina (2001) P. 893

[100] Birnie (2009) P. 694

[101] Brunnee (1996) P. 307

biological diversity".[102] The convention on biological diversity (CBD) acknowledges the human interferences which brought about decline in biodiversity, and demands alleviation of the causes at its sources. The CBD in its preamble states "Biological diversity is being significantly reduced by certain human activities" and that its conservation is a "common concern of mankind". Giving biodiversity a status of 'common concern' would mean a legitimization to put it under the protection of international legislation.

For forest-rich developing countries this would have the implication that dealing with issues of forests (forest protection) is not just a matter of domestic jurisdiction. This is because forests play important role in maintaining biodiversity. This in turn, arguably, confers on forests the status of "common concern". And I have suggested in chapter two that forests intersect with biodiversity conservation. Therefore, "although not concerned with forests per se, the Convention on Biological Diversity is or at least could be, of prime relevance to the development of forest law".[103]

It is a well accepted fact that forests are among the major habitats and foods on which biodiversity relies on for its survival. Thus, it is of crucial importance and critical necessity, granting forests, a protection of equal footing to biodiversity to hit the objectives of the convention. The objectives of CBD[104] among others include, "conservation of biological diversity, the sustainable use of its components, and the 'fair and equitable sharing of the benefits […]" These objectives though explicitly are about striking a balance between conservation and sustainable use of biodiversity, or more broadly between developed and developing states; the phrase "sustainable use of its components" among others, impliedly forms a conceptual basis for the protection and sustainable use of forests.

[102] B. Katrina, (2001) P.897

[103] Brunnee (1996) p. 310

[104] CBD, Article 1

This sustainability in forests context implies that the use of destructive practices and intensive technologies increase forest degradation thereby leading to declines in the economies and benefits of societies that they support. [105] It is thus, an effective tool of achieving forest sustainability; otherwise any unsustainable practice on forests can also have negative consequences on biodiversity. Pursuant to Article 5 of CBD:

> Each Contracting Party shall, as far as possible and as appropriate, co-operate with other Contracting Parties, directly or, where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction and on *other matters of mutual interest*, for the conservation and sustainable use of biological diversity. (Emphasis added).

The importance of cooperation as laid down under this article does not only emphasize on areas beyond national jurisdiction but also on other matters of mutual interest to protect biodiversity. Here it triggers the application of cooperation to forests protection. Because as I indicated above under chapter two; mutual interest includes forests. CBD also includes in Article 8 (d), the promotion of natural habitat protection. Since the provision of Article 8 is about in-situ conservation i.e. in its natural place/environment; protection of forests shares the protections under this provision.

As one eminent writer puts "Forests provide the most diverse sets of habitats for plants, […]. Consequently, the maintenance of forest ecosystems is crucial to the conservation of biological diversity and degradation of forests has a dramatic impact on biodiversity".[106] Protection of forests is a critical issue as it proves important services to our environment including as habitats for biological diversity; yet, States "value their freedom 'to do as they please with their own few remaining forests'".[107] CBD also maintain this concept of sovereignty in Article 3, and Article 15. I argue that nonetheless the convention can have strong influence on attempts to develop international forest law. As provided under many of the provisions of the CBD, states have duty to co-operate with each other on numerous counts.

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[105] Secretariat of the CBD (2004) P .1

[106] S. Johnston (2005) P. 52

[107] Brunnee (1996) p. 308

For instance, Article 20 (1), imposes on all parties (including the forest-rich developing states), the obligation to 'undertake', in fact on the basis of their 'capabilities' to contribute finance and incentives for the implementation of the objectives. But this seems that those funded states arguably, will not have a big say because they do not contribute to the fund; that means there will not be a free ride without undertaking the obligation. Even those funded developing countries have to; within the meaning of Article 21 (2) subject themselves to a careful monitoring and evaluation on a regular basis. This is also one way of qualifying the sovereignty principle laid down under Articles 3 and 15 of the same convention. Birnie (2009) argue:

> Much of the success of the biodiversity convention in ensuring the responsible exercise of state sovereignty when identifying and using biological resource depends on the willingness of parties to fulfill their various duties under it to cooperate, especially on providing the finance, technology, and other forms of support required for successful operation.[108]

Therefore, cooperation deems be given due regards. Apart from its provision as an specific obligatory requirement under Article 5, cooperation is further provided inter alia under: Article 9 (e) ex situ conservation i.e., outside of natural habitat conservation; Article 10 sustainable use of components of biological diversity; Article 12 (c) research in developing methods for conservation and sustainable use of biological resources; Article 13 public education and awareness on conservation and sustainable use.

Most of these provisions including the specific Article 5 are, however, not hard law provisions, because they are introduced as, "as far as possible and as appropriate". The language in a way refers i.e. "as possible"- related to the principle of 'common but differentiated responsibilities'; "appropriate"- states have the choice of the means to achieve the objectives/optional. So forest- rich developing countries may argue that it is not appropriate for them to subject their sovereignty to the obligation they assumed under the convention. This might imply the responsibilities under the convention are dependent upon the situations in the respective states.

[108] Birnie (2009) P. 648

However, there must be a balancing as the forest-rich sovereign states cannot violate the convention with impunity. This is because; forests exploitation apart from threatening biodiversity impairs the overall quality of the environment.[109] States having recognized such effects of environmental decline, entered into agreement on alleviating the problem have the implication that "by imposing obligations for protection of biodiversity, this treaty has shaped some of the contours of global forest law"[110].

3.1.1 Establishment of Protected Area

The Convention on Biological Diversity (CBD), in its Article 2, deals with protected area as "a geographically defined area, which is designated or regulated and managed to achieve specific conservation objectives". The need for protected area is given attention in the convention. In many of its provisions, the convention calls for the establishment of a system of protected areas or areas where special measures need to be taken to conserve biological diversity. Nonetheless, the call for protected areas does not give important place to forests protection explicitly.

Moreover, the definition of protected area recently coined by IUCN [111]: **"**A clearly defined geographical space, recognized, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values". Forests are not explicitly put in the explanation of this definition; nevertheless, the definition of forests in the context of forest protected areas is elaborated as the definition that draws on that of UNECE/FAO and adds interpretation from IUCN.

Accordingly, the UNECE/FAO[112] definition of forest is**:**

> Land with tree crown cover (or equivalent stocking level) of more than 10 percent and area of more than 0.5 ha. The trees should be able to reach a minimum height of 5 m at maturity *in situ*. A forest may consist either of closed forest formations where trees of various storey

[109] Ibid, above n 107, P. 309
[110] Ibid, P. 310

[111] Guidelines for Applying Protected Area Management Categories (2008) P.7

[112] Ibid, P. 52

> and undergrowth cover a high proportion of the ground, or open forest formations with a continuous vegetation cover in which tree crown cover exceeds 10 percent. Young natural stands and all plantations established for forestry purposes which have yet to reach a crown density of 10percent or tree height of 5 m are included under forest, as are areas normally forming part of the forest area which are temporarily un stocked as a result of human intervention or natural causes but which are expected to revert to forest. Includes: Forest nurseries and seed orchards that constitute an integral part of the forest; forest roads, cleared tracts, firebreaks and other small open areas; forest in national parks, nature reserves and other protected areas, such as those of special scientific, historical, cultural or spiritual interest; windbreaks and shelterbelts of trees with an area of more than 0.5 ha and width of more than 20 m; plantations primarily used for forestry purposes, including rubber wood plantations and cork oak stands. Excludes: Land predominantly used for agricultural practices. Other wooded land: Land either with a crown cover (or equivalent stocking level) of 5–10 percent of trees able to reach a height of 5 m at maturity *in situ*; or a crown cover (or equivalent stocking level) of more than 10 percent of trees not able to reach a height of 5 m at maturity *in situ* (e.g., dwarf or stunted trees); or with shrub or bush cover of more than 10 percent.

As per the IUCN policy guide lines, even a land being restored to natural forest *should* be counted as protected area if the principal management objective is the maintenance and protection of biodiversity and associated cultural values. Therefore, forests are well fit to and are part and parcel of the definition and in consequence, should receive important legal protection.

3.2 The Climate Change Legal Regime

In Protection of forests under CBD, though importance of forest protection is of immense significance, I have seen that forest issues have thus far played a subordinated role. In the climate change process, however, despite differences of interests among nations, there exist, convergence of views in particular the current approaches to protection of forests for climate sake. *Birnie* (2009, P. 356) characterize issues such as deforestation, protection of natural habitats and ecosystems, sea-level rise and sovereignty over natural resources as important causative factors of problem of carbon sinks.

Consequently, they view the traditional sectoral approach to the problems of climate change as inappropriate and hence, propose a holistic approach to this interwoven and

global character of changes in climatic condition. This is because as *Voigt* eminently notes the change in climatic condition occupies the centre of the structure of modern societies; it goes to the heart of industries, economies and global relationships.[113] The preamble of the UNFCCC itself recognizes the changes in climate conditions and its adverse effects as a common concern of international community. Though states reached consensus, and their agreement attracted universal attention; the 1992 UNFCCC has encountered deep differences of opinions from the parties in reference to measures to be taken and assignment of responsibility for addressing the problem.[114]

The developed states themselves do not have similar stand on measures to be taken in dealing with climate change. [115] Among the complicated problems *Voigt* eloquently addresses "Unprecedented questions of global equity, such as fairness in cost and responsibility sharing and differences in vulnerability and social aspects, [as linking] climate change to a multitude of interlinked problems of late modern society".[116] This can be stated as the main hindrance to the concerted efforts states need to undergo in addressing climate change problem.

Nevertheless, the state's boundary and the sovereignty issues are irrelevant with reference to changes in climatic condition. On this score also *Voigt* movingly notes, "The challenge of global climate change exceeds time and space limitations that previously defined singular problems of the world community and their respective legal responses".[117] This is envisaged in recently held various global climate change accords which include forests as the matter of core concerns in their agenda.

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[113] Voigt (2009) P. 58

[114] Birnie (2009) P. 357

[115] Ibid.

[116] Voigt (2009) P. 58

[117] Ibid.

Accordingly, Forest decline and loss has recently become big issues in climate change talks as a vital interest of governments, international organizations, NGOs, and other constituencies. Putting forests under international legal regime however, has proved to be a difficult task.[118] Nevertheless, this does not mean the crucial benefits of forests in mitigating climate change, or the consequence that forest decline pose to our atmosphere should be neglected. *Forner* (2006) posit "Despite the past failures, the importance that the international community has attributed to halting deforestation has kept international efforts alive, with the expectation that an international instrument will be agreed one day".[119]

True, the principles of international climate negotiations which were established in the United Nations Framework Convention on Climate Change (UNFCCC) long ago; signed in Rio in 1992, are now firmly gaining ground whereby it may soften sovereignty. This is because protection of forests for climate sake is crucial in that:

> Forests are vitally important in addressing climate change because forest ecosystems affect the climatic conditions experienced on earth's climate through the absorption of carbon in wood, leaves and soil. This carbon is released to the atmosphere when forests are burned or during forest clearance and harvesting. Quantifying the role of forests as sources of carbon emissions and in their role as carbon sinks has become essential to understanding the global carbon cycle. [120]

The UNFCCC was formulated in 1992's Rio summit and entered into force in 1994. Therefore the concern for climate change has been formally on the scene since 1994. Nevertheless, only recently has the issue of climate change shocked the ground of the world community with its potentially serious negative effects.[121] On this score, it has been noted also that "Forest clearing and degradation account for roughly 15% of global greenhouse gas emissions, more than all the cars, trains, planes, ships, and trucks on

[118] Keeping the forest for the climate's sake: avoiding deforestation in developing countries under the UNFCCC (2006) P. 276

[119] Ibid.

[120] Maguire (2010) P. 122

[121] Ibid.

earth".[122] This means it is "(s)imply too big a piece of the problem to ignore; fail to reduce it and we will fail to stabilize our climate".[123]

3.2.1 UNFCCC: Objective of the Convention

The ultimate objective of the UNFCCC is enshrined under Article 2 of the convention. Within the meaning of this Article 2, the objective of this framework is "[…] stabilization of green house gas concentration in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system". This objective of the framework convention aims at stabilizing the green house gas emissions. It does not however, strive to reverse its effects, but to slow.[124] The objective has been reiterated in many international, intergovernmental and even domestic legal and policy documents. As the level of 'dangerous anthropogenic interference' and the time frame at which the objective should be achieved has not been explicitly stated in the convention; Article 2 seems to merely suggest modest attempt to prevent the interference with climate change.

In my understanding, this is why changes in climatic conditions have prevailed and yet occurring on an increasing pace. However, *Voigt* posits that "Stabilization of greenhouse gas concentrations means, however, a *significant reduction* of emissions."[125] The other provision within the UNFCCC (though not objective, but related to deforestation) and general (for example, Article 4.1(d) provides for the promotion of the sustainable management of sinks and reservoirs), decisions that regulate these could also be general without the need to specify concrete targets. This option could request Parties to, for example, target financial assistance and enhance cooperation for the establishment of policies and measures to reduce deforestation.

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[122] Indigenous Lands, Protected Areas, and Slowing Climate Change (2010)

[123] Stern N (2007) []

[124] Birnie (2009) P.358

[125] Voigt (2009) P. 59

In fact more general decision likely causes less controversy. However, its general character may also make it less effective in practice. *Maguire* describes dangerous anthropogenic interference as a real, and having already taken place.[126] For instance, in Africa, besides the geographic location of the continent in the deserts of Sahara and Kalahari, exploitation of forests has greatly contributed to serious climate change which in turns amounted to drought that has caused a massive loss of human life in the continent. Furthermore, unlimited exploitation of forests by forest owner sovereign nations leads to the impairment of the overall quality of the global and the depletion of the resource base available for exploitation by future generation overburdens the future generations.

Therefore, consistent with these statements the provision of Article 2 of the UNFCCC "[…] level that would prevent dangerous anthropogenic interference with climate system" has already been outweighed. The time framework as envisaged by same Article 2, "with in a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner" also seems to have not met. The comprehensive implication of the message contained in the above statements is that the climate change is very near to, and the discussion to avert its effect needs to be placed on the table of every sovereign state.

As noted above, the objective of this frame work convention is stabilizing green house gas emissions. Protection of forests is critical for achieving the objective of the convention. Because, forests; according to *Wangari Maathai*,[127] act as the "lungs of the atmosphere" by serving as carbon sinks, and hence stabilizes green house gas concentration. Therefore, although not explicitly about protection of forests per se, the UNFCCC is of prime relevance to protection of forests. Moreover, by shaping some of

[126] Maguire (2010) P. 117

[127] W. Maathai (1940-2011) was a Kenyan environmental activist and the first African woman to receive the 2004 Nobel Peace Prize for her "contribution to sustainable development, democracy and peace".

the outlines of development of international forest law, this treaty has played a central role in protection of forests. For instance, in REDD: Reducing Emissions from Deforestation and Forest Degradation's negotiation under UNFCCC, protection of forests has been placed at the centre. Thus, the frame work convention (UNFCCC) can form conceptual basis for development of normative frame works pertaining to protection of forests.

3.3 Protection of Forests in REDD: Reducing Emissions from Deforestation and Forest Degradation

It is high that climate change is no longer theoretical, but it is real and has already occurred. This is therefore the main reason of protection of forests due to their climate mitigation role.[128] REDD[129] -a forestry based climate mitigation mechanism with its purpose i.e., an emission mitigation instrument focuses on carbon in forests than the forests themselves. Such instances make REDD to be perceived as a confusing picture. Nevertheless, though the aim of REDD is the stick of carbon in the wood, the inseparable i.e., complexities of forests leads the road to REDD's appreciation of such forest issues when it is in a sense falls outside its rational.

3.3.1 The Core Concepts of REDD

Reducing Emissions from Deforestation and forest Degradation(REDD) is a climate change mitigation instrument presently designed and negotiated under the United Nation's Framework Convention on Climate Change(UNFCCC). REDD as development of policy on forest issues arose at the eleventh session of the Conference of the Parties (COP) held in Montreal in 2005.Those discussions began with RED (i.e. limited to deforestation only) and expanded to REDD with consideration of forest degradation, then broadened to further consider forest conservation, sustainable forest management, and enhancement of forest carbon stocks (i.e. REDD+).

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[128] *See* IPCC (2007b), *supra* note 4

[129] REDD+ is used as REDD for the purpose of this thesis.

The concept of REDD is "[…] predicted on the assumption that forests will contribute to climate change mitigation only if their value increases to a level that makes protecting forests consistent with viable development strategies"[130] It is brought about by the proposition of the governments of Papua New Guinea and Costa Rica. The two governments proposed REDD to be added to the agenda of COP 11 hosted in Montreal. In this COP, REDD attracted attentions and received broad support. The concept of REDD after this conference is widely stated as:

> An effective international mechanism for Reducing Emissions from Deforestation and forest Degradation (REDD) under the United Nations Framework Convention on Climate Change (UNFCCC) may enable developing countries to merge the goals of national forest protection with their economic development, while helping combat climate change. REDD is therefore, an essential element in a viable global climate policy framework, and has gained global attention as a potentially effective and low-cost climate change mitigation option.[131]

REDD is developed under the United Nations Framework Convention on Climate Change (UNFCCC) in the context of global forest protection. Avoiding deforestation and forest degradation is noted as a highly cost-effective way of reducing green house gas emissions.[132] Therefore, this accrues to forests a great deal of international and national attention with in the climate change regime. In other words, this approach to protection of forests for the climate sake is a positive signal for the development of future international forest law. The Copenhagen Accord (2009); the Cancun Agreement (2010); and the Durban summit (2011) exemplify this. Under these meetings protection of forests has attracted attentions and become the key concern for developed and developing nations alike. And states also seem to have softened their sovereignty and strengthened their common interests on protection of forests. Nevertheless, the COP15 in Copenhagen (2009) was 'disappointing' for the climate change agenda was too ambitious, and also because the President of the Convention (the Denmark minister) was unable to mediate the enormous differences among all the Parties (192

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[130] Reducing Emission from Deforestation and Forest Degradation (REDD): An Options Assessment Report, for Government of Norway (2009)

[131] Ibid, above, n 126, p. 4

[132] Stern N (2006) pp. 337- 537.

countries).[133] It resulted in a nonbinding Accord, but provided the basis for the discussions in the COP16-the Cancun Agreement. COP16 was termed as more realistic than the Copenhagen summit; it integrated the five lines of the Bali Action Plan in to the UN process which were also discussed in COP15:[134]

- Mitigation: To define goals of reduction of emissions from deforestation and forest degradation- REDD+

- Financial support: To define mechanisms and commitments for long term support from the Annex-I to non-Annex I Parties

- Adaptation: To define financial support for climate action plans and regional scale projects

- Technology transfer: To transfer clean technologies and capacity building

- Long term vision: To advance in the negotiations to define collective goals to reduce emissions to avoid increases of temperature greater than 2_C in the near future.

According to the same author, in Cancun Agreement, the international community has arrived on consensus on a multilateral agreement that covers four of the five major topics of the agenda. It was signed by all parties (192 countries) including Japan, the United States, and China that initially had large differences. These four major accords of the Cancun Agreement are:

a) Deforestation Accord: its objectives are to establish a financial framework and to reinforce bilateral and multilateral efforts for forest protection and prevent clear-cutting. The framework would allow developed countries to finance others for reducing emissions from deforestation and degradation (REDD+). The agreement requires developing countries to create national

[133] Cavazos (2012), P. 153

[134] Ibid.

climate change action plans, establish a baseline for historic emissions from forest loss and create a system for monitoring their forest.

b) Green Climate Fund: This fund was proposed by Mexico in Copenhagen; it was rescued in the COP16 and accepted by the Parties. This fund will be managed by developed and underdeveloped countries to support adaptation and mitigation strategies.

c) Cancun Adaptation Framework: This framework is a guide for the decisions to support adaptation strategies in underdeveloped countries. The Convention established an Adaptation Committee to provide coherence in the implementation of the adaptation plans, to provide advice on financial mechanisms and eligibility for the new fund, to carry out reviews of portfolios of adaptation projects, and to facilitate the full implementation of these programs in underdeveloped countries. The Global Environmental Facility (GEF) will act as interim ministry of the Adaptation Fund Board and the World Bank will act as the interim trustee for the Adaptation Fund and the Adaptation Fund Board.

d) Technology Transfer: To support developing countries with clean energies, green technologies and capacity building.

Cavazos also defines the Cancun Agreement as historic agreement on protection of forests, and adaptation and technology frameworks to help the developing countries adopt clean energy and to adapt to climate change. He further explains that the Cancun Agreement has also recognized the gravity of global warming and set a goal of limiting average warming to 2_C above preindustrial levels. A lower limit of 1.5_C in its future negotiations was also considered in the summit to avoid vulnerability of small insular countries to sea-level rise.

In Cancun Agreement, the principle of 'Common, but Differentiated Responsibility' was adopted as an important resolution in their approach to reduce GHG emissions. These actions, *Cavazos* notes, will be registered through a system of monitoring, report, and international verification (MRV). Parties agreed to reduce emissions according to their own capabilities. This means both developed and developing states assumed responsibility to put a stop to the deterioration of forests in their respective sovereignty while new international reporting system tracks their progress.

Within the meaning of the Cancun Agreement, countries are required to submit standardized MRV reports based on IPCC measurement criteria; in particular, developing countries will need to carry out the MRV to be able to request and to receive financial support through the four major Cancun accords. This requirement enjoins states with the obligation to make environmental impact assessment whereby it lessens environmental law enforcement challenges in a way that it reduces race to the bottom (cheap environmental policy) commonly practiced in forest-rich sovereign states. It was agreed that a total of US$30 billion in fast start finance from developed countries will be available to support climate action in the developing world up to 2012, and the intention to raise US$100 billion in long term fund by 2020.

In sum, the resolutions signed in the Cancun Agreement made significant progress from COP15 in Copenhagen and set the basis for the December 2011 Durban negotiation in South Africa. Nevertheless, the emission reduction commitments and distribution of such efforts have not been resolved in Durban either; but, it ended as "one small promising step for climate change"[135] Therefore, a few times is a must necessity to actually establish a new forestry based climate architecture.

However, this shall not be construed as the rules global community has crafted under the above summits to implement the REDD instruments to protection of forests are

[135] Climate Brief: Focus on the Economics of Climate Change (2011)

without effects. They rather have potential of interference with the sovereignty of states concerned. Because, they demand the states at issue to adopt a new forest management laws and practices. And these states are deemed to behave in consonant with the international rules sought to protect forests global wise. "[…] with the introduction of markets for environmental services, state sovereignty concerns may not be as dominant as in previous international regimes".[136]

The purpose of REDD under the above summits is mainly to serve as an instrument of reducing emissions from deforestation and forest degradation i.e. to provide incentives to developing countries to decrease the level of deforestation and forest degradation taking place on unsustainable level. This in a way relieves forest-rich developing countries party from being the sole duty bearers in relation to protection of forests which to certain extent erodes their sovereignty. "This is because parties will be economically rewarded for infringements upon their sovereignty […]".[137] Thus, the states' crafting to implement the REDD instruments; and conference after conference is also making progresses detailed and protective; nonetheless, a close scrutiny reveals that the REDD+ issues including its framework legal content is taking shape. But, whether it will arrive soon enough for protection of forests at best remains to be seen.

[136] Maguire (2010) P. 157

[137] Ibid.

4 Conclusions

My first research question was "Is sovereignty a key obstacle for the development of binding international forest law?" At the very start of my analysis, I clearly demonstrated that the practical implementation of norms related to protection of forests shall fall in to the domain of state sovereignty. Since 1992 in Rio, the principle of state sovereignty has become the key obstacle to states' adopting a binding international forest law. Therefore, the likely failure to protect forests internationally in the concrete level with in a state can be put to the shoulders of traditional concept of state sovereignty and the soft law nature of forest regimes.

But it is my conviction that this does not mean one should fall into despair and conceive any attempt to save our global forests-common interests, as a lose case. From constructive angle, norms as the rest of our social reality, socially constructed. They are neither static nor outside our reach. Norms can be violated, referring to sovereignty.

My second research question was the following "Can states because of sovereignty violate available principles and conventions to destroy forests with impunity or are there some balancing mechanisms?" Pertinent with this, I found out that there are some problems of a clash between sovereignty and international approaches to protection of forests. They both can co-exist when the uses of forests by states do not interfere with the interests of others; but, they surely collide when states fail to share responsibility with protection of forests and yet skeptical to the international community's interference. This means that there is a power balance between states sovereignty and international approaches to protection of forests. Therefore, states cannot destroy forests with impunity. Under CBD and UNFCCC treaty regimes, nations are even better off in that they can continue to receive the benefits of protecting forests for biodiversity and climate sake. Given the enthusiasm with which the EU nations, and even the United States, are responding to the climate change crisis (with initiatives such as the Cancun

REDD Agreements, or the volunteering to pay for forests upkeep); I do not find that there could be other reasons behind developed countries which keep forest-rich states so skeptical about such interference with sovereignty for international support if countries decide to stop destroying their forests. Despite the language of the treaties, I do not also see that it is lawful, whatsoever forest-rich sovereigns provide as justification to consider the rules on protection of forests as optional. And neither do I accept the excuses they seek to make for their resistance to protection of forests in response to common interest as legitimate. Because, from a legal point of view, such instance tantamount to violation of principles and conventions I dealt with in the analysis; and symbolizes an irresponsible stance neglecting an urgent problem-destruction of forests. Right now the globe's generations are experiencing threats to their common interest due to forest destruction, and to the future generations, suffocation is going to be a commonplace death cause. Such a case necessitates protection of forests to be seen from the human rights angle.

To conclude based on my analysis, unlike its provisions in the traditional law, sovereignty in the case of protection of forests can be softened by the 'no-harm rules', and other principles and conventions which tie it to common responsibility. And protection of forests in return completely falls under the jurisdictions of the 'no- harm rules', human rights, CBD, UNFCCC and the REDD treaty regimes; and also under secondary rules that govern the destructive behavior of states when the primary rules pertaining to protection of forests are violated.

Consequently, despite absence of concrete international law relating to protection of global forests at present, the provisions enshrined under these principles, and conventions are important tools that can usefully be deployed to limit sovereignty and prevent further destruction of forests for sure. They are also momentous and influential legal rules and frameworks which can institutionalize protection of forests into a binding international forest law.

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